No. 3088

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHEW HOY QUONG, as Petitioner for and on behalf of His Wife, QUOK SHEE,

Appellant,

vs.

EDWARD WHITE, Commissioner of Immigration at the Port of San Francisco, California,

Appellee.

BRIEF OF APPELLEE

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division

JOHN W. PRESTON,
United States Attorney,

CASPER A. ORNBAUN,
Asst. United States Attorney,

Attorneys for Appellee.

Filed this.....day of March, A. D., 1918.

FRANK D. MONCKTON, Clerk,

By....., Deputy Clerk.

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BRIEF OF APPELLEE.

The petitioner seeks the discharge of the detained Quok Shee, a Chinese applicant for admission before the Immigration authorities, as the wife of a domiciled Chinese merchant, upon two grounds. The first ground is alleged in the petition for the writ (Tr. pp. 2 to 7) and the other in the amendment to the petition (Tr. pp. 11 to 14).

The allegation respecting the first ground appears in the petition as follows: (Tr. pp. 4 and 5).

> "That on the 25th day of September, 1916, after notice of appeal had been filed to the

Secretary of Labor by the then attorneys of record for Quok Shee, and request was made in writing by said attorneys, that they be granted the privilege of interviewing the applicant for the purpose of introducing further evidence in support of her appeal.

That thereafter on the 26th day of September, 1916, the Commissioner of Immigration refused counsel the right to interview the applicant, stating that there was no authority in either law or regulations for the granting of such a request."

The request and denial referred to are as follows:

"15530-6-29 Sept. 25, 1916.

Hon. Edward White,
Commissioner of Immigration,
Port of San Francisco,

Dear Sir:

In re QUOK SHEE, Merchant's Wife. 15530-16-29, ex S. S. Nippon Maru, Sept 1st, 1916.

This applicant has been detained at this port since the 1st day of September, 1916. She has been held incommunicado by you and has been permitted to have no communication with her husband, nor he with her since that time. Her case has been denied and such proceedings as have been had with respect thereto are now a matter of record. We have received your letter denying our application to have a review of the Law Section or the report of the examining inspector open to our inspection.

We now have upon file in this matter and pending your determination a request for a reopening and reconsideration of this case for the reasons specified in said application. In the event of a denial of this application we desire to have this request of record for an interview of this applicant with her husband as a basis for the introduction of further evidence in support of her appeal.

Yours very respectfully,
McGowan & Worley,
By George McGowan,
Attorneys for Applicant.

P. 50 Immigration Rec.
15530-6-29. Sept. 26, 1916

Messrs. McGowan & Worley,
Attys. at Law,
Bank of Italy Bldg.,
San Francisco.

Sirs: Replying to your communication of the 23rd and 25th inst., in re Quok Shee alleged wife of a merchant ex. S. S. "Nippon Maru," Sept. 1, 1916, you are advised that your request for reopening in that case contained in the letter first above mentioned must be denied for the reason that there is no apparent ground for the assumption that any contradictory statements appearing in the record were due to a misunderstanding of the questions propounded, and that the affidavit of the alleged husband is not new evidence within the meaning of the regulations.

The request contained in the 2d above mentioned letter that you as counsel and the alleged

husband be permitted to interview the applicant as a basis for the introduction of further evidence in support of her appeal must also be denied there being no authority in either the law or regulations for the granting of such a request.

Respectfully,

.....

WHW-ASH. *Acting Commissioner.*"

As to the second point, the amendment to the petition sets forth two memoranda contained in the record of the Bureau of Immigration at Washington, D. C. of an entirely different case—that of Lee Tong Shee—referring to certain confidential information that had been received by the Department of Labor from the Commissioner of Immigration at San Francisco concerning the said Lee Tong Shee and two other Chinese female applicants—one of them, Quok Shee, the detained in this case now before this Court. In respect to this, the petition alleges:

> "That your petitioner alleges upon information and belief that the immigration authorities decided the case of his wife for admission to the United States adversely for the reason of the above memoranda and not because of any discrepancies in the testimony adduced at the hearings before the immigration authorities."

The respondent, in his return to the petition and the amendment to the petition, denied, first: the allegation that a request had been made by Quok Shee's

attorneys that they had granted the privilege of interviewing Quok Shee for the purpose of introducing further evidence in support of her appeal, and second: that when Quok Shee appealed to the Secretary of Labor she was denied the privilege of rebutting the confidential matter referred to in the memoranda for the reason that the said memoranda were not before the Secretary of Labor at the time the appeal of Quok Shee was determined that the said memoranda were not in anywise considered by the Secretary of Labor and that they had no influence over the Secretary of Labor in his determination of the appeal.

The Court's attention is particularly called to the following allegations contained in the return: (Trans. pp. 21 to 23),

> "As a further answer and defense to said petition and amended petition on file herein, respondent alleges that during the month of December, 1916, and subsequent to the order of deportation of said Quok Shee by the said Secretary of Labor, the said Quok Shee, through her next friend, the petitioner herein, filed a petition for a writ of habeas corpus in this court, setting forth the same facts and circumstances, with the exception of the memorandums referred to in the said amended petition and the said reference to a refusal on the part of the immigration officers to permit the said applicant to consult her counsel in matters pertaining to her appeal, that now appears in this petition; that at the time of filing the said first

petition for a Writ of Habeas Corpus, all of the facts and circumstances were at the disposal of the said applicant or her counsel, or the petitioner, that now appear in the record concerning the case of the said applicant, or referred to by counsel in this petition for a Writ of Habeas Corpus on a demurrer filed by the respondent to said petition; that thereafter an appeal was taken by the said petitioner to the United States Circuit Court of Appeals for the Ninth Circuit and the matter fully presented to said Court and the appeal was denied; that thereafter, and on or about August 28, 1917, the said petitioner petitioned the said United States Circuit Court of Appeals for a rehearing of said case, setting forth in said petition for rehearing the same matters that are now set forth in the said petition before this Court; that said United States Circuit Court of Appeals denied the said rehearing, and in this connection respondent alleges that all of the matters referred to in said petition, which is now before this Court, have been fully determined."

The proceedings in this Court and to which reference is had in the portion of the return just quoted, are entitled: "Chew Hoy Quong, Appellant, vs. Edward White, Appelle, Number 2926."

Counsel for the appellant will not deny that the District Court disposed of the point that Quok Shee's counsel was, on request, denied the privilege of an interview with her regarding her appeal, solely upon the ground that the Court could not properly hear the petitioner urge in this second proceed-

ing a point that he might have raised, but failed to raise, in the former proceeding.

Even if the merits of this first contention of unfairness should be gone into, it would take but a glance effectually to differentiate this case from that of Mah Shee, cited by the appellant in this brief, for here the alleged requests reads:

> *"We desire to have this request of record for an interview of this applicant with her husband as a basis for the introduction of further evidence in support of her appeal."*

While in the Mah Shee case the request read:

> *"We now request an interview with this applicant with her husband as a basis for the introduction of further evidence in support of her appeal."*

Thus, it is perfectly obvious that in this case of Quok Shee, the request was simply for an interview with her by her alleged husband and not by her attorneys; and that in the Mah Shee case, the request was for an interview with her by both the alleged husband and her attorneys.

In its opinion in the Mah Shee case, this Court, in holding that the refusal to permit the interview in so far as the attorneys were concerned constituted unfairness, expressly stated that there was no unfairness in the refusal in so far as the alleged husband was concerned. While it is true that in this Quok Shee case, the Commissioner of Immigration

in refusing the request as made, included the attorneys, such inclusion of the attorneys was plainly an inadvertance, for, as has been already stated, the request did not include an interview by the attorneys.

As to the second and remaining point raised by the petitioner, to-wit: that the said memoranda in the Lee Tong Shee case refers to the receipt by the Department of certain confidential matter involving Quok Shee, the alien concerned in the instant case, it is thought necessary to do no more than refer to the entire Immigration record containing all the evidence and proceedings by the local Commissioner of the Bureau of Immigration and the Department of Labor, which record is designated as respondent's Exhibit "A" and is now before this Court in this appeal. This record does comprise, and must be presumed to comprise, all of the evidence and other matter that were before the Secretary and that he considered when he passed upon the appeal in this case.

Although the Government is confident that this Court will confirm the order of the lower court in dismissing the appeal for the writ, it is thought advisable, out of an abundance of precaution, to take occasion to pray that in the event the lower court is reversed, that Court be instructed that should it consider an order of discharge proper in the future proceeding before it, such order shall not be final but conditional, to be effective only in case the Im-

migration authorities should fail to give Quok Shee, applicant for admission, the fair hearing required by law, within thirty days after the issuance of the mandate by this Court. Such an order is contained in the concluding paragraph of the opinion of this Court in White vs. Wong Quen Luck, 243 Fed. at page 549. An express order to this effect would be made necessary by a recent expression of the District Court that it was disposed to afford the Immigration authorities opportunity to conduct a fair hearing before discharging an alien only when this Court expressly so orders in the particular case.

Respectfully submitted,

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United States Attorney,

CASPER A. ORNBAUN,
Asst. United States Attorney,

Attorneys for Appellee.